



COVID-19
**FRUSTRATION
OF CONTRACTS**

LITIGATION AND DISPUTE RESOLUTION

Frustration of Contracts in the Context of the Covid-19 Pandemic

by **Jill Callanan, Clare Dowling**

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Frustration of a contract occurs where contractual obligations can no longer be performed as a result of unforeseen circumstances that are beyond the control of either party.

Where there is no “force majeure” clause in a contract, and where performance of the contract has become impossible, due to the Covid-19 pandemic, frustration may be a possible remedy.

The doctrine of frustration is based on reasonableness and fairness, but it is of narrow scope and the threshold of proof required to successfully claim frustration is extremely high.

Due to the constraints imposed on society during the current pandemic, many businesses are struggling to perform their obligations under certain contracts which were executed long before the current situation was in the contemplation of either party. These constraints may lead to situations whereby the contract is impossible to perform.

Two examples of successful claims for frustration of contract were in the following two cases:

1. In *Kearney v Saorstat and Continental Shipping* (1943). When the ship upon which Kearney was employed was sunk, it was held to be a frustrating event. The sinking of the ship terminated Kearney's contract of employment and therefore his widow was not entitled to compensation when he was killed a few days later on another ship that rescued him.
2. In *Keon v Hart* (1896) the death of one of the joint agents who were party to a joint agency agreement was held to terminate the contract.

The test for frustration of a contract is very subjective and each case will be taken on its own merits. The following are some general guidelines in relation to claims for frustration of a contract.

1. Increased Burden and Economic Crash is Not Sufficient

The contract merely becoming more difficult to perform is not sufficient in a claim of frustration. Brexit, for example, was not held to be a frustrating event in the recent case of *Canary Wharf (BP4) T1 Ltd v European Medicines Agency*. The European Medicines Agency (EMA) made a claim for frustration in relation to a lease they had entered into in respect of a particular property. EMA argued, inter alia, that Brexit would cause frustration of their common purpose to provide a European Headquarters as EMA would have to relocate to a Member State after Brexit. However, this argument was rejected and there was held to be no frustration of the contract merely because the circumstances meant that the contract would be more difficult to perform.

Financial impossibility to perform obligations under a contract will not necessarily amount to frustration. The difference between impossibility as a defence to specific performance and frustration of a contract was addressed in *Park East South East Construction Limited v MPTJ (Waterford) Developments Limited*. The Court held that even though the contract was impossible to perform due to financial impossibility, the obligations under the contract remained as the contract subsisted and damages can be awarded in lieu of specific performance of the agreement.

2. Frustration of a Business Venture

If it has become impossible to secure the benefits envisaged by the contract, the contract may be frustrated depending on whether the whole basis of the contract has been destroyed, so as to make its performance something fundamentally different to that which was envisaged. The “Coronation Cases” are the basis for this concept of frustration of a business venture and are an example of how frustration may occur when the precise purpose of the contract becomes impossible.

In *Krell v Henry* (1903) the plaintiff let some rooms overlooking the area where the coronation processions were to take place. When the coronation was cancelled, the plaintiff sued for the remaining £50 that was outstanding. The defendant successfully claimed that the cancellation of the event was frustration of the contract.

That case can be contrasted with *Hearne Bay Steam Boat Co v Hutton* (1903). A steamboat was hired for the purpose of viewing the Naval Review and to sail around the fleet. When the Naval Review was cancelled, the Defendant claimed frustration of contract when he was sued for the outstanding sum owed for the charter. The court held that there was no frustration on the basis that the Naval Review was not the foundation of the contract.

Covid-19 and Frustration

Ireland, along with the rest of the world, is facing an unprecedented period of uncertainty due to Covid-19. Although the scope for frustration is extremely narrow, there may be some situations whereby contracts are frustrated by the pandemic. Key considerations will include whether the contract has become physically or commercially impossible to perform or whether the obligation under the contract has become “radically different” to that which was initially envisaged by the parties.

Should you require further information in relation to any of the matters raised in this article please contact Jill Callanan (jcallanan@ikshields.ie) or Clare Dowling (cdowling@ikshields.ie).

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About the Authors



Jill Callanan
Partner

Jill is Head of the Litigation and Dispute Resolution Department. She advises on all aspects of commercial litigation and dispute resolution.

T: + 353 1 637 1551 E: jcallanan@lkshields.ie



Clare Dowling
Partner

Clare practises in commercial litigation, specialising in corporate insolvency and restructuring and commercial disputes.

T: +353 1 637 1532 E: cdowling@lkshields.ie